SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

THE UNITED STATES OF AMERICA,
ex. rel.
MARCELO RODRIGUEZ,

Petitioner-appellant;

- against -

79 Civ. 8598
(Pro-se)

UNITED STATES ARMY, COMMANDER,
243 FLUSHING AVENUE, BROOKLYN,
NEW YORK, 11251.

Hon. DAVID R. HARRIS, Superintendent,
GREENHAVEN CORRECTIONAL FACILITY, at,
DRAWER B, STORMVILLE, NEW YORK,12582.

Respondent-appellees;

A P P E N D I X

Mr. MARCELO RODRIGUEZ
DRAWER B ▲ # 76-A-3247
STORMVILLE, NEW YORK, 12582
Petitioner-appellant in Pro-se

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APPENDIX NUMBER 1

UNITED STATES CIRCUIT COURT
SECOND CIRCUIT OF NEW YORK

THE UNITED STATES OF AMERICA,
ex. rel.
MARCELO RODRIGUEZ,

Petitioner-appellant;

- against -

UNITED STATES ARMY, COMMANDER,
243 Flushing Avenue, Brooklyn,
New York, 11251.

Hon. DAVID R. HARRIS, Superintendent,
Greenhaven Correctional Facility, at,
Drawer B, Stormville, New York,12582.

Respondent-appellees;

79 Civ. 8598
(Pro-se)

NOTICE OF APPEAL
(Pursuant to Rule 10
(1-4), Rules of the
Supreme Court of the
United States)

et. seq.

SIRS:

PLEASE TAKE NOTICE, that an appeal is being taken to the SUPREME COURT OF THE UNITED STATES, by MARCELO RODRIGUEZ, petitioner-appellant, named within the above captioned matter, against the UNITED STATES ARMY, COMMANDER, 243 Flushing Avenue, Brooklyn, New York, 11251; Hon. DAVID R. HARRIS, Superintendent, Greenhaven Correctional Facility, Drawer B, Stormville, New York, 12582, from the judgment rendered by this Honorable Court, against petitioner-appellant, on the eighth day of February, one-thousand-one-hundred-and-eighty, denying petitioner-appellant's Motion for a Certificate of Probable Cause, on the Judgment appealed from the UNITED STATES DISTRICT COURT, for the EASTERN DISTRICT OF NEW YORK, rendered under Docket Number 79 Civ. 305.

PLEASE TAKE FURTHER NOTICE, that the appeal to the SUPREME COURT OF THE UNITED STATES, is being taken under the provisions of Section 2241(a)(1-4), Tittle 28 United States Code, the Jurisdictional Statute, providing for jurisdiction, on the jurisdictional issue of "Custody." Title 28 U.S.C., Section 1251(a)(1)(b)(2).

PLEASE TAKE FURTHER NOTICE, that MARCELO RODRIGUEZ, herein named as petitioner-appellant, appeals from each and every intermediate order, as well as from the whole thereof, and from each and every part, of said Judgment of Dismissal, as well as from every intermediate order therein rendered.

SWORN TO BEFORE ME, THIS
21 day of Feb, 1980.
Colleen A. Zeller
Notary Public

COLLEEN A. ZELLER
Notary Public, State of New York
Dutchess County
Comm. Expires March 31, 1980

RESPECTFULLY SUBMITTED
S/ Marcelo Rodriguez
Mr. Marcelo Rodriguez
Drawer B - # 76-A-3247
Stormville, New York, 12582.
Petitioner-appellant in pro-se

UNITED STATES CIRCUIT COURT
SECOND CIRCUIT OF NEW YORK

THE UNITED STATES OF AMERICA, ex. rel.
MARCELO RODRIGUEZ,

Petitioner-appellant;

- against -

UNITED STATES ARMY, COMMANDER,
243 Flushing Avenue, Brooklyn,
New York, 11251.

Hon. DAVID R. HARRIS, Superintendent,
Greenhaven Correctional Facility, at,
Drawer B, Stormville, New York, 12582.

Respondent-appellees;

79 Civ. 8598
(Pro-se)

"A P P L I C A T I O N"

in

FORMA PAUPERIS
(Pursuant to Sections, 1915, Tittle 28 U.S.C.; 3006(A)(9), Tittle 18 U.S.C.)

et. seq.

STATE OF NEW YORK)
COUNTY OF DUTCHESS) s.s.

MARCELO RODRIGUEZ, first being duly sworn deposes and says;

That I have filed a timely Notice of Appeal, from the Judgment of Dismissal on an Order rendered against me, at the United States Circuit Court for the Second Circuit of New York, on the eighth day of February, one-thousand-one-hundred-and-eighty.

That I am a poor person, and unable to pay the costs of this appeal.

That I move this Honorable Court, under the provisions of Sections 1915, Tittle 28 United States Code; Section 3006(A)(9), Tittle, 18 United States Code, for permission to proceed in Forma Pauperis, and for the assignment of counsel, to prosecute this appeal, on my behalf.

That I wish to dispense with printing, and appeal on a typewitten brief, and the original record, a copy of the latter, to be furnished, to my assigned counsel, free of charge, and for such other and further relief as this Hon. Court may deem just and proper.

SWORN TO BEFORE ME, THIS
21 day of Feb, 1980.
Colleen A. Zeller
Notary Public

COLLEEN A. ZELLER
Notary Public, State of New York
Dutchess County
Comm. Expires March 31, 1980

RESPECTFULLY SUBMITTED
S/ Marcelo Rodriguez
Mr. Marcelo Rodriguez,
Drawer B, - # 76-A-3247
Stormville, New York, 12582.
Petitioner-appellant in Pro-se.

APPENDIX NUMBER 2

2/5/80

PRO SE
79-8598

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of February, one thousand nine hundred and eighty.

Marcelo Rodriguez,

Appellant,

v.

Commander,

Appellee.

A motion having been made herein by ~~relator~~ Appellant pro se for a certificate of probable cause, for leave to proceed in forma pauperis, ~~for transcription of the minutes at the expense of the United States,~~ and for the assignment of counsel ~~and for~~

Upon consideration thereof, it is

Ordered that said motion be and it hereby is DENIED.

DENIED

Sterry R. Waterman, U.S.C.J.

Walter R. Mansfield, U.S.C.J.

Jack B. Weinstein, U.S.D.J.

WRM SRW Weinstein

FPI-MAR—8.3.78

APPENDIX NUMBER

3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

MARCELO RODRIGUEZ,

Petitioner,

-against-

79 C 305

COMMANDER, UNITED STATES ARMED FORCES, DEPARTMENT OF THE ARMY, 243 Flushing Avenue, Brooklyn, New York; DAVID J. HARRIS, Warden, Green Haven Correctional Facility,

Respondents.

- -x

MEMORANDUM ORDER

By memorandum order dated October 17, 1979, petitioner's application for a writ of habeas corpus was dismissed. He has now applied for a certificate of probable cause under 28 U.S.C. §2253 seeking leave to appeal the court's decision. Such a certificate is issued, however, only where the petition is not frivolous and presents some question deserving appellate review. Alexander v. Harris, 595 F.2d 87 (2 Cir. 1979).

Because the court is of opinion that the petition raises no question deserving appellate review in that the issues raised are squarely controlled by settled principles of law, no certificate of probable cause will issue. Hence, if petitioner intends to pursue an appeal, he should apply for a

certificate to a judge of the United States Court of Appeals for the Second Circuit, Foley Square, New York, N.Y. 10007.

SO ORDERED.

The Clerk of the Court is directed to furnish copies of this memorandum order to petitioner pro se, Drawer B - #76-A-3247, Stormville, New York 12582; and to the United States Attorney for the Eastern District of New York, attention Michele Coleman Mayes, Esq.

Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, New York
December 3, 1979

APPENDIX
NUMBER

4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

MARCELO RODRIGUEZ,

Petitioner, : 79 C 305

-against-

COMMANDER UNITED STATES ARMED FORCES, DEPARTMENT OF THE ARMY, 243 Flushing Avenue, Brooklyn, New York; DAVID J. HARRIS, Warden, Green Haven Correctional Facility, : MEMORANDUM AND ORDER

Respondents.

- -x

APPEARANCES:

MARCELO RODRIGUEZ,
Petitioner Pro Se

EDWARD R. KORMAN, ESQ.
United States Attorney,
Eastern District of New York
Attorney for Federal Respondent
By MICHELE COLEMAN MAYES, ESQ.
Assistant U. S. Attorney

NEAHER, District Judge.

Petitioner is currently a New York State prisoner incarcerated at Green Haven Correctional Center in the Southern District of New York, where he is serving two consecutive life sentences for murder and a term of twenty-five years for armed robbery. His petition for a writ of habeas corpus filed pursuant to 28 U.S.C. §2241 claims that his Sixth Amendment right to a speedy trial has been violated by

(Exhibit # 4b)

respondent's failure to dissolve a military detainer lodged against him which seeks his return to respondent's custody upon his release from his State term of imprisonment.[1] It also claims petitioner's rights under the Interstate Agreement on Detainers, 28 U.S.C. App., have been abridged.

In 1969, petitioner, a serviceman, was transferred from duty in Arizona to Fort Monmouth, New Jersey. Soon after his arrival petitioner became absent without leave from the Army and never returned. On July 24, 1975, the Army lodged a military detainer against petitioner upon discovering he was being held in New York City on charges of murder and armed robbery for which he was ultimately convicted in 1976 and is now serving the sentence imposed.

While his appeal of the State court convictions was pending, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. At that time, he claimed he was due a "speedy disposition of the charges [underlying] the detainer." Respondent's Exhibit B at ¶9(a). By Endorsement Order dated February 27, 1979, Judge Pierce dismissed the petition on the ground that it was jurisdictionally defective under Schlanger v. Seamans, 401 U.S. 487, 491 (1971), in that petitioner's custodian was not in the Southern District of New York but rather was in New Jersey at Fort Monmouth where the detainer

would return him. The court also held that there were not sufficient meaningful contacts in the Southern District to find petitioner's commanding officer constructively present under Strait v. Laird, 406 U.S. 341, 345 (1972). The Court of Appeals affirmed the judgment on October 26, 1978, for the reasons given by Judge Pierce with the addition of a citation to Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).

Although there is little doubt that jurisdiction would be proper in the United States District Court for the District of New Jersey since it appears petitioner's commanding officer is located there and the detainer would ultimately return him to Fort Monmouth, it is equally clear that jurisdiction also exists in this district under the rationale of Schlanger and Strait. The military detainer in this case was issued by the Armed Forces Police Detachment at Army Headquarters in Brooklyn. It states that "[p]ursuant to an agreement between the SENIOR MILITARY COMMANDERS of all the services in the metropolitan area of New York, this detainer takes precedence over all other military detainers." It further states that "[i]t is requested that this Headquarters be notified prior to the release of the subject and that he be detained until such time as he can be taken into custody by this activity. The subject referred to herein should be

released only to authorized personnel of this Headquarters (Armed Forces Police)." In these circumstances, "one in the chain of command" is most certainly present in this district, Schlanger v. Seamans, supra, and the existence of meaningful military contacts here, Strait v. Laird, supra, has been sufficiently demonstrated to establish jurisdiction. See Meek v. Commanding Officer, 452 F.2d 758 (3 Cir. 1971).

The court agrees, however, with much of Judge Pierce's commentary on the merits of the petition, although not because of any collateral estoppel effect petitioner fears. With respect to petitioner's "speedy trial" claim, assuming it is applicable in its traditional sense to the military procedures that will be followed in disposition of the "charges" underlying the detainer, two defects are apparent. First, to the extent petitioner's application seeks vacatur of the detainer and dismissal of whatever "charges" underlie the detainer, it runs afoul by analogy to the rule in this circuit that pretrial petitions by State defendants asserting speedy trial defenses to prosecution must be dismissed by a federal court in order to afford the State courts the first opportunity to rule on the merits of the claim. Cf. United States ex rel. Scranton v. New York, 532 F.2d 292 (2 Cir. 1976); Raffone v. Stack, 425 F. Supp. 345 (D. Conn. 1976). See also Braden v. 30th Judicial Circuit Court of Kentucky, supra; Dolack v.

Allenbrand, 548 F.2d 891 (9 Cir. 1977). Since a military tribunal or court hearing charges against petitioner would be obliged to follow any constitutional duties imposed on it, such a court should have an opportunity to decide petitioner's claim in the first instance. See Parisi v. Davidson, 405 U.S. 34 (1972). It should be noted, however, that respondent denies that any charges are currently pending against petitioner. See Respondent's Exhibit C.

Moreover, and to the extent the petition seeks to compel respondent to execute the detainer and expedite the hearing on the "charges," Moody v. Daggett, 429 U.S. 78 (1976), suggests petitioner's claim is without merit. Addressing a contention that a federal parolee has a right under the due process clause of the constitution to a prompt revocation hearing on a parole violator warrant lodged against him as a detainer on the basis of an intervening federal conviction, the Supreme Court rejected the theory on the ground that the prisoner's confinement derived from the intervening conviction and not from the unexecuted violator warrant. Similarly, petitioner's custody here stems not from the detainer lodged against him (and which suggests possible future custody) but from his intervening State sentence. The detainer does not constitute the type of immediate restraint on one's liberty generally recognized to require prompt resolution of the claim.

Cf. Braden v. 30th Judicial Circuit Court of Kentucky, supra. Finally, should petitioner find himself prejudiced by delay in disposition of any "charges" brought against him, he will have ample opportunity to present such a claim in defense of the charges or through appellate or collateral remedies thereafter available to him.

Finally, petitioner's claim under the provisions of the Interstate Agreement on Detainers Act does not entitle him to relief. The Act is triggered only when another party State lodges a detainer against a prisoner of another party State on the basis of an untried indictment, information, or complaint. In the absence of formal charges of any nature against petitioner, see Respondent's Exhibit C, Affidavit of Nick DeMaria, the Act's time limits appear inapplicable, and it is equally probable that respondent merely desires to process petitioner's discharge from service upon termination of his State sentence rather than charge him formally with desertion. Cf. United States v. Dobson, 585 F.2d 55 (3 Cir. 1978) (Act does not apply to parole violator warrant); Sable v. Ohio, 439 F. Supp. 905 (D. Okla. 1977) (same). It is in any event a questionable proposition that a military detainer represents charges pending "in any other party State," activating the Act's time limits. See Endorsement Order, Pierce, J., dated February 27, 1978. See also Moody v. Daggett, supra, 429 U.S. at 81 n.2.

Accordingly, petitioner's application for a writ of habeas corpus is denied in all respects.

SO ORDERED.

The Clerk of the Court is directed to enter judgment dismissing the petition. The Clerk is further directed to send copies of this memorandum and order to petitioner pro se and to the United States Attorney.

Edward R. Neaher

U. S. D. J.

Dated: Brooklyn, New York
October 17, 1979

F O O T N O T E

[1] Petitioner has also named David J. Harris, Warden of Green Haven Correctional Facility, as respondent. Counsel for Warden Harris has informed the court that he will not oppose the petition since petitioner's State custody would not be affected even were the relief sought to be granted. "Respondent" hereafter refers only to the federal respondent.

APPENDIX NUMBER

5

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON, N. J. 08605

CHAMBERS OF
CLARKSON S. FISHER
CHIEF JUDGE

October 12, 1979.

NOT FOR PUBLICATION

Mr. Marcelo Rodriguez, # 76-A-3247
Greenhaven Correctional Facility
Drawer "B"
Stormville, New York 12587
(Petitioner, pro se)

Robert S. Steinbaum, Esquire
Assistant United States Attorney
970 Broad Street
Newark, New Jersey 07101
(Attorney for Federal Respondents)

FILED
OCT 12 1979
At ~~9:30~~ 4:15 P. M
ANGELO W. LOCASCIO
Clerk

RE: UNITED STATES OF AMERICA EX REL. MARCELO RODRIGUEZ v. THE UNITED STATES ARMY; COMMANDER, FORT MONMOUTH, NEW JERSEY; WARDEN, GREENHAVEN CORRECTIONAL FACILITY; UNITED STATES ATTORNEY GENERAL; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; SECRETARY OF DEFENSE. Civil Action No. 79-1178.

OPINION

Gentlemen:

Petitioner Marcelo Rodriguez brings this action for a writ of habeas corpus releasing him from the custody of the Commander of the United States Army at Fort Monmouth, New Jersey. The Army's custody over petitioner is alleged to arise out of a military detainer lodged against him with his present custodian. Presently before the Court is the United States' motion to dismiss the petition for failure to state a claim upon which relief can be granted, Federal Rules of Civil Procedure 12(b)(6), or, in the alternative, for summary judgment, Federal Rules of Civil Procedure 56.

I. BACKGROUND

Petitioner is presently incarcerated in the Greenhaven Correctional Center in Stormville, New York ["Greenhaven"]. He is serving two consecutive life sentences for murder and a consecutive 25-year term for armed robbery. By his own admission, therefore, petitioner is now in the actual physical custody of New York State authorities. Petitioner does not use this petition to attack the validity of his convictions in New York.

When the offenses for which he is presently incarcerated were committed, petitioner was a member of the United States Army, and was absent without leave from his assigned duty station at Fort Monmouth, New Jersey. Upon learning of petitioner's whereabouts, the Commander of Fort Monmouth lodged a detainer with the Warden of Greenhaven pursuant to Army Regulation ["A.R."] 630-10 § III:1-8. The detainer directs the warden to return petitioner to the Army upon his release from civilian custody. 1/

Petitioner filed the instant petition on April 16, 1979. It names as respondents the Commander of Fort Monmouth, the United States Army, the Secretary of Defense, the United States Attorney General [hereinafter collectively referred to as the

---

1. The detainer states: "It is requested that this Headquarters be notified prior to the release of the subject and that he be detained until such time as he can be taken into custody . . . . " See Exhibit 1 to Brief in Support of Defendant United States of America's Motion to Dismiss, or in the alternative, for Summary Judgment ["Defendant's Brief"]. Civil authorities are authorized to detain servicemen after a scheduled release date for return to the military under 10 U.S.C. § 808.

"United States"], the Warden of Greenhaven, and the Attorney General of the State of New Jersey. 2/ The petitioner alleges that he is in the custody of the Commander of Fort Monmouth by virtue of the military detainer and that such custody is unlawful and in violation of petitioner's Sixth Amendment right to a speedy trial and the Interstate Agreement on Detainers ["IAD"], 18 U.S.C. App. § 2.

The United States' current motion must be considered in two steps. The United States first challenges the petitioner's assertion that he is in the custody of the Commander of Fort Monmouth. Lacking such custody, the United States argues, petitioner may not obtain judicial review of the United States' actions by way of habeas corpus. Second, should this Court find that petitioner is in the custody of the Commander of Fort Monmouth, the United States argues that petitioner's custody is not unlawful. 3/

---

2. Although no motions have been filed on their behalf, the Court will, sua sponte, dismiss the petition as to the Attorney General of the State of New Jersey, who is not alleged to have custody of the petitioner, and as to the Warden of Greenhaven, whose custody of the petitioner is not attacked and who is not within the territorial jurisdiction of this Court. See 28 U.S.C. § 2254; Schlanger v. Seamans, 401 U.S. 487, 491 (1971).

3. I note that the petitioner raised these identical issues in the United States District Court for the Southern District of New York. Rodriguez v. United States Army, Civil No. 77-5135 (Order of Dismissal entered Feb. 27, 1978), aff'd memo, No. 78-206 (2d Cir. Oct. 6, 1978). Although Judge Pierce dismissed the petition for lack of subject matter jurisdiction because the Commander of Fort Monmouth was not within the territorial jurisdiction of the court, see Schlanger v. Seamans, supra, note 2, 401 U.S. at 491, the district court also ruled in the alternative on the grounds now urged by petitioner. The United States has not raised as a defense res judicata or collateral estoppel. 28 U.S.C. § 2244(a).

II. THE JURISDICTIONAL ISSUE: IS PETITIONER IN THE CUSTODY OF THE COMMANDER OF FORT MONMOUTH?

This Court's power to issue writs of habeas corpus, its very subject matter jurisdiction to decide the claims underlying such petitions, is granted by 28 U.S.C. § 2241(a). That grant of power, however, is limited. The statute provides in part that:

> (c) The writ of habeas corpus shall not extend to a prisoner unless -
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2241(c) (emphasis added).

In the circumstances of this case, therefore, it is absolutely necessary that petitioner be "in custody" as that term is used above before I may consider the merits of the petition.

I must reject the United States' contention that petitioner is not in the custody of the Commander of Fort Monmouth. Although plainly in the actual physical custody of the Warden of Greenhaven, I believe that petitioner is also constructively in the custody of the Commander of Fort Monmouth.

It is now well settled that a petitioner need not be actually incarcerated by his custodian to enjoy the protection of the writ of habeas corpus. A parolee, for example, is in custody for habeas purposes. E.g., Morrissey v. Brewer, 408 U.S. 471 (1972). Likewise is an individual released on his own recognizance pending appeal. E.g., Hensley v. Municipal Court, 411 U.S. 345 (1973). The custody requirement is also satisfied by an incarcerated petitioner who seeks to challenge not his present incarceration but the possibility of future incarceration posed by a detainer lodged pursuant to the Interstate Agreement on Detainers. E.g., Braden v. 30th Judicial District, 410 U.S. 484 (1973). Finally, an unexecuted parole violator warrant lodged as a detainer constitutes "custody". See Moody v. Daggett, 429 U.S. 78 (1976). Although the circumstances of the petitioner's custody may be integrally related to constitutional questions of what due process is due before a protected liberty interest may be infringed, see, e.g., Morrissey, supra; Braden, supra; Moody, supra, the custody issue is jurisdictional and must be determined separately from and prior to the adjudication of the constitutional issues underlying the habeas petition.

The United States asks this Court to hold that a military detainer does not impose a form of constructive custody upon the petitioner sufficient to trigger a right to review by way of habeas corpus. The United States would have me distinguish a military detainer from a detainer under the IAD, first, because a military detainer does not arise out of an indictment or information based upon probable cause, see A.R. 630-10 §§ III, IV, and, second, because the military detainer only serves to keep military authorities appraised of the whereabouts of military

personnel, and does not authorize civilian authorities to hold prisoners beyond an otherwise scheduled release date. See A.R. 630-10 § III:1-8(b).

I believe that these distinctions do not make a significant difference with respect to the availability of habeas corpus relief. An examination of the Supreme Court's decision in Moody reveals that although Moody was found not to have shown that his custody was unlawful, the Supreme Court did rule on the merits of his challenge. An unexecuted parole violator warrant lodged as a detainer was apparently considered by the Supreme Court to impose sufficient custody to entitle the petitioner to review of the state's actions by way of habeas corpus. I am of the opinion that the custody imposed by a military detainer is at least as great as that imposed by an unexecuted parole violator warrant. I therefore hold that petitioner is in custody for the purpose of the availability of habeas review, and I must look to the merits of petitioner's application.

III. THE SUBSTANTIVE CLAIMS

A. Violation of the IAD.

Petitioner's first contention is that the actions of the United States violated the IAD, 18 U.S.C. App. § 2 art. III(a), to which the United States is a party. 4/ In answer to this

4. The military detainer attacked by petitioner was lodged with New York State authorities on July 24, 1975. On December 17, 1976, petitioner sent "Written Notice" to his custodian requesting that he be turned over to the United States Army so that the charges against him could be determined. When no action was taken in response to this notice within 180 days, petitioner sought to have the detainer dissolved. See 18 U.S.C. App. § 2 art. III(a). Petitioner's request was refused.

contention the United States argues, first, that the IAD does not apply to the military and, second, that if it does, the United States' actions did not violate the IAD. I agree with the United States as to both of these contentions.

First, I do not believe that the United States Armed Forces are parties to the IAD. The United States certainly became a party to the IAD, joining both for itself and the District of Columbia. See 18 U.S.C. App. § 2. I believe it fair to conclude that the United States joined on behalf of the civilian criminal justice systems administered in the federal district and District of Columbia courts. Considering the long honored and strong tradition of separating the civil and military justice systems in this country, see, e.g., Schlesinger v. Councilman, 420 U.S. 738, 753-60 (1975); Parker v. Levy, 417 U.S. 733, 743-44 (1974), I do not believe that it would be proper to conclude that the United States intended to join as well on behalf of the military justice system separately administered by the military courts absent an express declaration of that intention. 5/

Second, I believe that the IAD, even if it were generally applicable to the military, was not violated. Article III(a) of the IAD, which petitioner contends was violated by the United States, provides that:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting

5. I have found no reported cases directly addressing this issue. Neither have I found any cases applying without discussion the IAD to military detainers. Judge Pierce, however, reached the same conclusion on his prior disposition of this matter.

> officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: Provided, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. . . . .

18 U.S.C. App. § 2 (emphasis added).

Although the IAD does not define the term detainer, Congress, in deciding to become a party to it, stated that a detainer is "notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction". S. Rep. No. 91-1536, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. Code Cong. & Adm. News 4864, 4865. See also, United States v. Mauro, 436 U.S. 340, 359 (1978).

In the instant case the detainer lodged with the warden was not based upon any untried indictment, information or complaint against the petitioner. There were no charges pending against him. See Exhibit 4 to Defendant's Brief. In fact, the record reveals that the detainer was not lodged with the warden for the purpose of eventual prosecution. The United States desired the petitioner's eventual presence so that his discharge could be arranged under either A.R. 635-206, providing for an undesirable discharge from the service in the event of a civil court conviction, or for separation from the service under the Vietnam War deserters amnesty program. See Exhibits 3, 6 to Defendant's Brief. This is in accord with the fact that a military detainer is defined in A.R. 630-10 § I:1-3(c) to be "[a] written notice to civil authorities that the person in their custody is a member of the Army and that the military authorities desire to take custody upon release", and as such is not based upon an indictment or information or any other probable cause determination. It therefore does not represent any underlying pending criminal charge and is not a detainer as that term is used in article III(a) of the IAD.

I therefore conclude that no violation of the IAD has occurred.

B. Sixth Amendment Claims.

Petitioner's second claim is that his Sixth Amendment right to a speedy trial or court martial has been violated because no disposition has been made of the desertion charge implicit in the detainer.

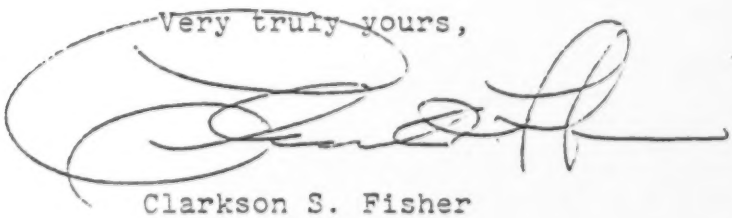
No Sixth Amendment speedy trial right attaches prior to the time that some charge is brought against the petitioner, whether by arrest or indictment. E.g., United States v. Marion, 404 U.S. 307, 313 (1971). In this case petitioner has not been "accused" of any crime as that term is used in Marion. Id. at 321-22. Petitioner's military record merely reflects that he has been absent without leave since May 30, 1969. No formal charges are currently pending against him. See Exhibit 4 to Defendant's Brief. Petitioner has not been arrested on account of these charges. There is therefore no basis upon which a Sixth Amendment violation can be found.

Although petitioner has not asserted any other constitutional claim, because he is proceeding pro se I will discuss briefly the due process claim fairly raised by the allegations of the petition. Petitioner has been absent without leave since 1969. The Army discovered his whereabouts in 1975. The petition was filed in 1978. The petition can fairly be read to charge that the delay in bringing formal charges against him could prejudice his due process right to a fair trial. U.S. Const. Amend. V; Marion, supra, 404 U.S. at 324. Petitioner has not at this time, however, made any showing of prejudice, so he has not shown that he is entitled to have the detainer dissolved. See also Moody v. Daggett, supra.

IV. CONCLUSION

I therefore conclude that I have jurisdiction to determine the legal issues raised by this petition by virtue of 28 U.S.C. § 2241(a), (c). I also conclude that petitioner has not shown that he is entitled to have the detainer lodged with the Warden dissolved. The motion of the Federal Defendants for summary judgment is therefore granted and judgment will be entered accordingly.

Very truly yours,



Clarkson S. Fisher
Chief Judge
United States District Court
District of New Jersey

CSF/ebj

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA ex rel. MARCELO RODRIGUEZ, Petitioner,	:	Civil Action No. 79-1173.
v.	:	
THE UNITED STATES ARMY; COMMANDER, FORT MONMOUTH, NEW JERSEY; WARDEN, GREENHAVEN CORRECTIONAL FACILITY; UNITED STATES ATTORNEY GENERAL; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; SECRETARY OF DEFENSE, Respondents.	:	O R D E R

Marcelo Rodriguez having petitioned this Court for a writ of habeas corpus, and the Federal Defendants having moved for summary judgment,

IT IS, for the reasons expressed in this Court's opinion dated and filed this Twelfth day of October, 1979, ORDERED that the petition of Marcelo Rodriguez for a writ of habeas corpus is dismissed as against the Attorney General of the State of New Jersey and the Warden of Greenhaven Correctional Facility;

IT IS FURTHER ORDERED that the motion of the Federal Defendants for summary judgment is granted;

AND IT IS FURTHER ORDERED that the petition of Marcelo Rodriguez for a writ of habeas corpus is hereby denied. Judgment is entered accordingly.

Clarkson S. Fisher
Chief Judge
United States District Court
District of New Jersey

FILED

OCT 12 1979

At 3:30 P.M.
ANGELO W. LOCASCIO
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 79-1178

UNITED STATES OF AMERICA
ex rel. MARCELO RODRIGUEZ,

Petitioner,

v.

THE UNITED STATES ARMY;
COMMANDER, FORT MONMOUTH,
NEW JERSEY; WARDEN,
GREENHAVEN CORRECTIONAL
FACILITY; UNITED STATES
ATTORNEY GENERAL; ATTORNEY
GENERAL OF THE STATE OF
NEW JERSEY; SECRETARY OF
DEFENSE,

Respondents.

O R D E R

CLARKSON S. FISHER
CHIEF JUDGE
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Dated and Filed: 10/12/79

(Exhibit # 4)

APPENDIX NUMBER

6

Section 2241(a)(c)(1-5), Title 28 United States Code:

(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilage, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

A P P E N D I X
N U M B E R

7

INTERSTATE AGREEMENT ON DETAINERS ACT
Section 2; Article II(a), 18 U.S.C., Appendix.

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into Law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form: (Emphasis added)

ARTICLE II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico. (Emphasis added)

A P P E N D I X
N U M B E R

8

ARMY REGULATION 630-10, Section I: 1-3

(c). "Detainer." A written notice to civil authorities that the person in their custody is a member of the Army and that military authorities desire to take custody upon release.

ARMY REGULATION 630-10, Section III: 1-8

1-8 General. a. When information is received that an absentee/deserter is in the custody of civilian authorities, or receiving treatment in a civilian medical facility, the member will be returned to Army custody at the earliest practicable date. To accomplish the return to military control, installation coordinating agents will receive information on such military personnel and cause detainers to be placed by the provost marshal, when appropriate, after verification of their status by the adjutant general as specified in paragraph 1-4e.

b. Military detainers are not intended to authorize civilian law enforcement officials to hold an individual after he would otherwise be released; these detainers are merely requests for notification. However, Title 10 U.S.C. Section 808, does grant civilian law enforcement officials authority to hold -and individual who has bee dropped from the rolls as a deserter for delivery into military custody after he would be release.

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

THE UNITED STATES OF AMERICA,
ex. rel.
MARCELO RODRIGUEZ,

Petitioner-appellant;

- against -

UNITED STATES ARMY, COMMANDER,
243 FLUSHING AVENUE, BROOKLYN,
NEW YORK, 11251.

Hon. DAVID R. HARRIS, Superintendent,
GREENHAVEN CORRECTIONAL FACILITY, at,
DRAWER B, STORMVILLE, NEW YORK,12582.

Respondent-appellees;

79 Civ. 8598
(Pro-se)

PROOF OF SERVICE

STATE OF NEW YORK)
COUNTY OF DUTCHESS) s.s.

MARCELO RODRIGUEZ, first being duly sworn deposes and says;

That under the date of notarization of these moving papers that he has placed at the hands of the Official Parties at the Greenhaven Correctional Facility, located at Drawer B, Stormville, New York, 12582, has caused such Official Parties to serve (via) the United States Postal Services, true and accurate copies of the foregoing Jurisdictional Statement and Appendix, upon all the Respondent Parties named herein.

cc: To: THE CLERK OF THE COURT
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.,

To: UNITED STATES ARMY, COMMANDER,
243 FLUSHING AVENUE
BROOKLYN, NEW YORK, 11251

Proof of Service. Cont:

To: Hon. DAVID R. HARRIS, Superintendent
GREENHAVEN CORRECTIONAL FACILITY
DRAWER B
STORMVILLE, NEW YORK, 12582.

To: THE OFFICE OF THE U.S. ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
44 FOLEY SQUARE
NEW YORK, NEW YORK, 10007

To: Hon. ATTORNEY GENERAL OF THE STATE OF NEW YORK
2 WORLD TRADE CENTER
NEW YORK, NEW YORK, 10007.

SWORN TO BEFORE ME, THIS
21 day of July, 1980.

Colleen A. Zeller
Notary Public

COLLEEN A. ZELLER
Notary Public, State of New York
Dutchess County
Comm. Expires March 31, 1982

RESPECTFULLY SUBMITTED
S/ Marcelo Rodriguez
Mr. Marcelo Rodriguez
Drawer B - # 76-A-3247
Stormville, New York, 12582.
Petitioner-appellant in Pro-se